

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON, PETITIONER

v.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF
THE UNITED STATES BUREAU OF EMPLOYEES' COM-
PENSATION, SIXTH COMPENSATION DISTRICT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER

On December 14, 1953, this Court granted the petition for a rehearing filed by respondents Gulf Florida Terminal Company and American Mutual Liability Insurance Company, and vacated the order entered on November 16, 1953, granting the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit. It is our understanding that the petition for certiorari now will be further considered by the Court in light of the brief in opposition that has been submitted by these respondents.

The initial memorandum on behalf of respondent Deputy Commissioner set forth our belief that review by this Court is warranted to resolve a conflict between the Circuits on a question of importance in the administration of the death benefit provisions of both the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.* and the Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. 751 *et seq.*, which in relevant part is in *para materia*. As was there noted, the court below in the instant case has followed its earlier decisions¹ to the effect that, as a matter of law, the term "widow", as it is defined in Section 2(16) of the Longshoremen's Act, does not encompass the legal wife of a deceased longshoreman who, although living apart from him *ab initio* "for justifiable cause or by reason of his desertion", subsequently entered into a bigamous or common law relationship with another individual. This holding, as the Fifth Circuit expressly recognized, does not accord with the view of the Second and Ninth Circuits, which is that a post-separation relationship on the part of the wife can have no bearing upon her status as the "widow" entitled to death benefits.²

Respondent employer and its insurance carrier concede, as they must, the existence of the conflict in this respect (Pet. for Rehearing, p. 3). They

¹ *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348 and *American Mutual Liability Ins. Co. v. Henderson*, 141 F. 2d 813.

² *Associated Operating Co. v. Lowe*, 138 F. 2d 916 (C.A. 2); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9).

contend, however, that it assumes no significance in the disposition of the present litigation since the Deputy Commissioner further found that on June 7, 1951, some twenty-five years after the desertion, the longshoreman had inquired as to whether petitioner would take him back and, having no intention of ever living with him again, she had responded in the negative (R. 10). The Fifth Circuit took this event to supply an additional basis for the affirmance of the Deputy Commissioner's order denying petitioner's claim for compensation.³

While cognizant of this alternative ground advanced by the court below, we did not discuss it in the prior memorandum for several reasons. In the first place, it is far from clear that the Deputy Commissioner's determination that petitioner was not living apart from the longshoreman at the time of his death "for justifiable cause or by reason of his desertion" was grounded to any extent upon the refusal of the wife to accept the belated offer to resume marital relations. The Deputy Commissioner was undoubtedly aware that, under the prior holdings of the Fifth Circuit (see fn. 1, *supra*), petitioner's bigamous marriage in itself required the rejection of her claim. Accordingly, there was no necessity for him to consider the effect of this re-

³ The court said: "We are in no doubt that [the *Ryan Stevedoring Co.* and *American Mutual Liability Ins. Co.*] cases were correctly decided and should not be departed from. But if we are incorrect in the view that they were well decided on their facts, the judgment should still be affirmed, since it is undisputed and found that three weeks before his death the deceased had endeavored to have the plaintiff return to him and she had refused to do so". (R. 26.)

fusal. And had the Deputy Commissioner deemed petitioner to have been under some form of obligation to accept the longshoreman's offer to return, it is reasonable to suppose that he would have so stated in clearer terms. Although we do not necessarily subscribe to petitioner's view that state divorce law is the proper criterion for evaluating a wife's status for the purposes of Section 2(16) of the Longshoremen's Act (Pet. 6, 7), irrespective of the applicable standard there is considerable force to the argument that, after a twenty-five year separation, a wife is justified in taking a casual offer of reconciliation as affording insufficient basis for returning to the husband. It is significant in this connection that, insofar as the Deputy Commissioner's findings show, the offer made here was not coupled with any assurance by the longshoreman that he would in future fulfill his marital obligations to petitioner.

Even if the administrative determination rested in part upon considerations other than petitioner's bigamous marriage, the case still merits review. The fact remains that the Fifth Circuit chose to place its decision primarily on its prior holdings⁴ and, in doing so, it has made it plain to the Deputy Commissioners within its bounds that, notwithstanding the views of the other Courts of Appeals, it will not uphold an award of compensation to a woman in petitioner's situation. Thus, as long as

⁴ The District Court, on its part, confirmed the order rejecting compensation solely on the authority of these holdings (R. 15, 16).

the conflict remains, the proper administration of the Longshoremen's Act will be substantially impaired.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

DECEMBER 1953.